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No. 82-1787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE BUCKINGHAM CORPORATION

Petitioner,

v.

THE ODOM CORPORATION,
d/b/a Arizona Distributing Company,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Petitioner's Questions 1, 2, and 3 are based upon incorrect characterizations of the evidence and of the court of appeals' holding. Question 4 was not raised below, and Question 5 is not a "question" at all. The only question which properly could be stated in light of the record below is the following:

Did the court of appeals err in holding that there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict?

PARTIES TO THE PROCEEDINGS

The Arizona Distributing Company division of The Odom Corporation was sold to Foremost-McKesson Inc. on March 8, 1983. The entity is now known as McKesson Wine & Spirits dba Arizona Distributing Company. The Odom Corporation retained all causes of action relating to this case.

The subsidiaries of The Odom Corporation are: Campco, Alaska, Inc.; Campco Pacific, Inc.; Clearwater Beverage, Inc.; Famous Brands, Inc.; and S & D Investments, Inc.

Petitioner's parent and affiliates are listed in the Petition. In addition to petitioner and respondent, the parties in the court below included Copper State Distributors, Inc. and Mazel Corporation. These parties also have an interest in the outcome of the appeal. Upon information and belief, the parents and affiliates of Mazel Corporation and Copper State Distributors include: Peerless Importers, Inc.; Johnny Barton, Inc.; All American Distributing Co., Inc.; and Klick Distributing Co.

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BRIEF IN OPPOSITION TO PETITION

The issue presented for review in this case is simply whether the court of appeals properly held, after reviewing the evidence in the light most favorable to respondent, that a directed verdict should not have been granted. This is a factual question which has no importance beyond this case. The court of appeals did not consider its decision significant enough to publish, and did not discuss any of the so-called questions listed in the Petition. In an effort to create an issue worthy of this Court's attention, petitioner recasts the evidence in its favor, contorts the holding of the court of appeals, grasps at the coattails of another case pending in this Court, and presents questions which were not raised below.

COUNTERSTATEMENT OF THE CASE[1]

Petitioner's selective recitation of the "facts," nearly devoid of record citation, ignores the principle that respondent is entitled to have all reasonable inferences drawn in its favor. [2]

I.

Respondent's Termination.

Through its former subsidiary, Arizona Distributing Company ("ADC"), respondent introduced Cutty Sark scotch whiskey to the state of Arizona, and distributed it continuously until its distributorship was terminated in 1981. Tr. 196-97. During that time, relying on petitioner's representation of a "partnership," respondent expended over $800,000 for local advertising of the product, notwithstanding petitioner's total control over such expenditures; as a result, Cutty Sark was unprofitable to respondent. Tr. 198-201, 236, 257, 283. Nevertheless, Cutty Sark was a "necessary evil," because as one of the "big four" premium scotches (Pet., p. 5; Tr. 81), it was a "door opener" for the remainder of respondent's products. Tr. 201-02. Until 1981, the business relationship between petitioner and respondent was "outstanding." Tr. 406-07, 412-13; Exh. 12. Respondent played a large role in helping to build Cutty Sark into one of the leading brands of scotch whiskey in the country. Tr. 199.

When new management assumed control in late 1980, petitioner underwent a major change in its pricing philosophy. Richard Newman, petitioner's new president, insisted that Cutty Sark pricing be "firmed up" to be "in line" with the other premium scotches: J & B, Johnnie Walker Red, and Dewar's. Pricing of Cutty Sark had been "bastardized," according to Newman, because "wholesalers were competing against each

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[1] The following abbreviations are used in this brief: "Tr." (trial transcript); "Exh." (trial exhibit); "CR" (district court docket number); "Pet." (Buckingham's Petition for Certiorari); "Pet. App." (Appendix to Petition); "Resp. App." (Appendix to this brief).

[2] Pet. App. B, p. 9a; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034, 1036 (9th Cir. 1975).

other." Tr. 409-10, 417. Petitioner's objective was to establish Cutty Sark retail prices in a "parity relationship" with the rest of the "big four." Tr. 675. Nevertheless, although petitioner "suggested" and discussed resale prices, it ostensibly recognized its obligation not to dictate such prices or to become involved in pricing disputes between its distributors. Tr. 121, 437-38, 458-59, 625.

In late April 1981, respondent ran a special ten day discount on Cutty Sark (Tr. 207-10; Exh. 101) which petitioner regarded as "excessive." Tr. 449. Although petitioner later claimed that its real objection was that this discount was done "without a plan" (Tr. 118-19, 450), in fact, the discount was part of a carefully coordinated effort which successfully stimulated sales. Tr. 207-15, 294, 345-46, 367-71.

Immediately upon learning of respondent's discount, Bernard Gellerman, the president of Copper State (respondent's competitor) telephoned Kenneth Ahlburg, petitioner's Vice President and Western Division Manager, whose office was in Los Angeles. Gellerman was "upset;" he called the discount "ridiculous," and assured Ahlburg that he was "not going to compete with that price." Tr. 585-86, 631-32. Instead of ignoring these complaints, as company policy required, Ahlburg demanded to know "what the hell [was] going on in Arizona" (Tr. 585), and promised Gellerman that "we'll find out what's going on." Tr. 633-34, 705. Ahlburg instructed Terry Lichtenberger, the regional sales manager, to investigate and confront Jack Braddock, respondent's president. Tr. 634, 705.

Soon thereafter, Gellerman again complained, this time to Lichtenberger, that respondent was "screwing up the market." Tr. 455-56. Gellerman, upset because he was no longer "controlling the market," demanded that petitioner "do something about it." Tr. 455-57, 464. Once again, instead of ignoring this protest, Lichtenberger promised to see Braddock. Tr. 461-62.

Lichtenberger relayed Gellerman's complaints to Braddock, who explained that since Copper State, through lower pricing, had outsold respondent in recent months, the discount had been initiated to stimulate sales, encourage respondent's

sales force, and to "show the competition [*i.e.*, Copper State] that we were still in the business of selling Cutty Sark." Tr. 217-19, 462-63. Lichtenberger reported back to Ahlburg, who responded that he did not "appreciate this type of thing happening." Tr. 471, 475, 478.

Ahlburg next telephoned his superior, Stephen Karp, petitioner's Senior Vice President, in New York. Once more, instead of instructing Ahlburg to ignore this pricing dispute between petitioner's distributors, Karp directed Ahlburg to go to Phoenix to investigate. Tr. 109, 635. Ahlburg went to Phoenix and confronted Braddock, who repeated the explanation he had given Lichtenberger. Tr. 221-22, 640-41. Ahlburg warned Braddock that such discounting was "definitely against" petitioner's new philosophy, and that Buckingham wanted, "in the future, [to] have a say in the programming of the brand," *i.e.*, "to outline [respondent's] discounts." Tr. 221-22, 645.[3]

Later that same day, Ahlburg met Gellerman. Ahlburg repeated portions of his conversation with Braddock. Gellerman assured Ahlburg of his belief that discounts were a "stupid move." Tr. 592-93, 596-97. When told of Braddock's statement that Copper State had priced below respondent from time to time, Gellerman replied: "I swear I've never done that" or "I swear I've not been doing any such pricing." Tr. 589, 591-93, 712; Exh. 101. Gellerman then asked for the line on an exclusive basis, *i.e.*, for the termination of respondent, and promised: "I will make this kind of commitment, whatever it takes to build this brand I'm here to do it." Tr. 712-13. Ahlburg promised Gellerman that he would recommend respondent's termination. Tr. 519, 592, 713.[4]

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[3] "Programming" means pricing and discounting of a product, as well as other aspects of marketing. Tr. 223, 361.

[4] Gellerman's testimony flatly contradicted Ahlburg's and Lichtenberger's in a number of important respects. For example, Gellerman first admitted, then denied, that he had discussed pricing or discounting at all, denied that Ahlburg had said anything about meeting Braddock, and "did not recall" his complaining statements to Lichtenberger. Tr. 509-11, 513, 515-18, 569, 582-83. Gellerman even denied that he had complained to Ahlburg at all about respondent's discounts, asserting: "[I]f I would have said anything to him about the discounts I know his words would have been, 'Hey, if you can't stand the heat get out of the kitchen.' I wouldn't have said anything." Tr. 568.

The next day, Ahlburg returned to Los Angeles and telephoned his report and recommendation to Karp. Karp told Ahlburg to put things "down on paper." Tr. 110, 647-50, 714-15. Ahlburg did so in the form of a memorandum to Karp (the "Ahlburg Memorandum"), dated April 29, 1981, to which he attached a copy of respondent's "deal sheet" listing the April discounts. Tr. 653-55; Exh. 101, Resp. App.[5] This document—the only document in the case which discussed the reasons for the termination (Tr. 660-61)—repeated Ahlburg's unhappiness with respondent's discounting, reported Gellerman's "swearing" that he had not done the same, and concluded by recommending the termination of respondent. Exh. 101, Resp. App.

Before this time, Karp had been "non-committal" about the situation in Arizona. Tr. 107. In late April, he received the Ahlburg Memorandum (Tr. 109), and sometime thereafter recommended to Newman that respondent be terminated. Newman relied totally on Karp's oral recommendation, and devoted about five minutes to the decision. Tr. 667-71. By June or early July 1981, Karp told Ahlburg that petitioner was "going to go" with the termination. Tr. 662. Respondent was notified on August 17, 1981. Tr. 296, Exh. 103.[6]

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[5] Although petitioner reproduced the Ahlburg Memorandum in its appendix (Pet. App. F, p. 20a), it failed to include the "deal sheet," which was also a part of Exhibit 101. Respondent has reproduced the entire exhibit as an appendix to this brief.

[6] Petitioner insisted that pricing was "irrelevant" to the decision to terminate (Tr. 651), and continues to advance other reasons. Pet., p. 4. Respondent presented evidence from which the jury could have rejected all of these reasons:

First, Copper State's "victory" in the "wine contest" was due to greater inventory; respondent abandoned the contest after one month when advised by Lichtenberger that it could not catch up without paying a surcharge over the usual price to obtain more wine. Tr. 229-31, 286-87, 324-27. Moreover, Newman testified that the results of the wine contest were irrelevant to a distributor's ability to sell Cutty Sark. Tr. 692.

Second, contrary to petitioner's assertion (Pet., p. 4), the record did *not* show that "Copper State's comparative sales performance figures were consistently higher than ADC's." Respondent's total sales were higher through 1981 until its termination, and had increased by a greater margin during the preceding year. Tr. 207-08, 570-71, 680; Exh. 50.

Third, Braddock explained that his "necessary evil" comment reflected no lack of commitment; indeed, respondent had sold the product for twenty-five years on an unprofitable basis precisely because it had such a commitment. Tr. 198-202.

(footnotes continued on following page)

II.

Proceedings Below.

Although it portrays itself as having been dragged into litigation as the helpless victim of circumstances, in fact it was petitioner which initiated this case and was the plaintiff in the district court. Only one week after respondent was notified of its termination, petitioner filed an action for declaratory judgment on August 25, 1981. CR 1. Respondent answered and counterclaimed on September 16, 1981, adding Copper State and its parent Mazel Corporation as counterdefendants, and alleging, *inter alia*, that it was terminated pursuant to unlawful concerted action to eliminate price competition, in violation of the Sherman Act, 15 U.S.C. § 1. CR 19. Following an expedited discovery schedule, a jury trial commenced on November 17, 1981. Petitioner and Copper State moved for a directed verdict following three days of testimony. The district court changed its mind three times before finally granting the motion (Tr. 807, 873, 888), on the ground that there was "no evidence to show that [counterdefendants] acted in concert." Tr. 888, Pet. App. C, p. 15a. Judgment was entered on December 10, 1981. Pet. App. D.

In a five page, unpublished memorandum filed February 25, 1983, the court of appeals reversed, holding that "there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict." Pet. App. B, p. 9a. Contrary to petitioner's surmise that the court of appeals considered only two items of evidence and ignored other critical evidence (Pet., pp. 13-15), it is clear from the court of appeals' memorandum that petitioner's evidence was considered fully:

> "Buckingham presented evidence that it terminated ADC in its independent discretion and for legitimate business reasons unrelated to price. This evidence included

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(footnotes continued from preceding page)

Fourth, in view of Gellerman's denials on the stand of statements made by *petitioner's* witnesses (*see* note 4, *supra*), and his trial demeanor (which of course cannot be observed on appeal), the jury could have concluded that he perjured himself, and rejected not only his testimony but petitioner's claim that he "had persistently displayed his commitment." Pet., p. 4.

Buckingham's desire to upgrade the Cutty Sark image, its desire for an eager distributor to whom Buckingham's brands would be important, the results of the wine contest, the comparison of growth in Cutty Sark sales prior to the April discount, the "Ceccarelli" testimony, and the Finlandia discount.

"Viewing the evidence in the light most favorable to Odom, however, we find that there was sufficient evidence to support a jury verdict in its favor by reasonable persons. Particularly persuasive are the "Ahlburg Memorandum" which focused on the pricing reasons for the termination, and Gellerman's offer to make a "commitment" in exchange for an exclusive distributorship. While Gellerman might have only meant a commitment to sell the product aggressively, a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price. We therefore conclude that the district court erred in granting a directed verdict." (Pet. App. B, pp. 9a-10a.)

Petitioner did not seek a rehearing in the court of appeals.

REASONS FOR DENYING THE WRIT

This case does not present any issue beyond the correctness of the court of appeals' review of the evidence. None of the legal issues raised by petitioner were even addressed by the court of appeals. In reality, petitioner asks this Court to independently review the evidence and substitute its judgment for that of the court of appeals.

I.

The Court Of Appeals Reviewed The Evidence And Correctly Concluded That A Directed Verdict Should Not Have Been Granted. There Is No Conflict Between That Holding And The Decisions Of This Court Or Any Other Circuit.

Petitioner's arguments that the court of appeals' ruling "encourages anti-competitive behavior" and "rests upon two basic errors of law" are specious. Pet., pp. 12-16.

The "two basic errors of law" identified by petitioner are (1) that the court of appeals gave too much weight to respondent's evidence, specifically the Ahlburg Memorandum and Gellerman's promise of a "commitment" (Pet., pp. 13-14); and (2) that the court of appeals did not give enough weight to what petitioner terms "the most probative piece of evidence on the conspiracy issue." Pet., p. 15. This is a transparent attempt to present a factual question—the sufficiency of the evidence—and not a legal question. As Mr. Justice Holmes declared in *United States v. Johnston*, 268 U.S. 220, 227 (1925):

> "We do not grant a certiorari to review evidence and discuss specific facts."

Petitioner characterizes the court of appeals' ruling as standing for the proposition that "complaints" and "inquiries" are all that are necessary to reach the jury on a vertical price-fixing claim. Pet., p. 13. Such a "holding" cannot be found in the court of appeals' decision, and the evidence cannot be so characterized. Respondent has conceded throughout this case that proof of *concerted action* is necessary, *i.e.*, that it must prove that petitioner and Copper State "had a unity of purpose or a common design and understanding, or a meeting of the

minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).[7] The evidence was sufficient to permit reasonable jurors to infer that, far more than merely "inquiring" into the situation, petitioner reached a "meeting of the minds" with Copper State concerning resale pricing and the termination of respondent.

In its attack upon the sufficiency of the evidence, petitioner incorrectly implies that the court of appeals relied *only* on the Ahlburg Memorandum and a single statement by Gellerman in reaching its decision. Pet., p. 13. While the court of appeals found these items of evidence "particularly persuasive," (Pet. App. B, p. 9a), there is no indication that it relied solely upon them. Other evidence supported the court of appeals' decision, including among other things the Ahlburg-Gellerman and Ahlburg-Braddock discussions of pricing, Gellerman's "swearing" that he was not a price cutter, Ahlburg's warnings that discounting violated Buckingham philosophy, Lichtenberger's statement that respondent was terminated because it violated that philosophy (Tr. 481), the discrediting of the asserted non-price reasons for the termination, and the sharp conflict in the testimony of counterdefendants' witnesses on crucial issues. Petitioner isolates two items of evidence, then separately analyzes and rejects them, in violation of the rule that conspiracy evidence must not be compartmentalized, but considered as a whole. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 699 (1962).

Petitioner makes two jury arguments regarding the evidence cited by the court of appeals. First, it contends that the

[7] Direct evidence of a formal agreement, such as petitioner apparently would demand, is unnecessary. A combination or conspiracy may be found in "a course of dealings or other circumstances as well as in any exchange of words." *Id.* at 809-10. Because such agreements are invariably covert, and because "conspiracy is rarely susceptible of direct proof, a plaintiff must rely on circumstantial evidence." *Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1195 (9th Cir. 1980). A "knowing wink can mean more than words." *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965).

Ahlburg Memorandum "said nothing about an agreement," and was contrary to "the overwhelming weight of the evidence at trial indicat[ing] that Buckingham's principal reasons for terminating ADC were unrelated to price." Pet., p. 13. However, the statement in the memorandum that: "I spoke to Bernie Gellerman and he swears he has not been doing any such pricing," when placed in the context of the other evidence, certainly permitted the inference of an understanding. Moreover, since the only document which discussed the termination mentioned only price, and since petitioner's other excuses for the termination were discredited (*see* note 6, *supra*), it is simply incorrect that "the overwhelming weight of the evidence" pointed to non-price reasons.[8] Second, petitioner interprets Gellerman's promised "commitment" as just an offer to sell the product aggressively. Pet., p. 14. The jury, however, placing this remark in the context of other evidence, including Gellerman's "swearing" in the same conversation that he was not a price cutter, "might have interpreted it as an offer to let Buckingham have some control over price." Pet. App. B, p. 10a.[9]

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[8] Petitioner is of course correct that under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), a supplier may *unilaterally* terminate a distributor for price reasons. The decision below is in no way inconsistent with this rule, since the court of appeals required, and the evidence indicated, *concerted* action. Pet. App. B, p. 9a.

> "When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act." (*United States v. Parke, Davis and Co.*, 362 U.S. 29, 44 (1960).)

[9] Petitioner's reliance upon *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), for the proposition that price fixing should be excused if it may promote interbrand competition, is also misplaced. There, the Court cautioned:

> "[W]e are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." (*Id.* at 52 n.18.)

Galloway v. United States, 319 U.S. 372 (1943), is completely inapposite. There, in a claim for veteran's benefits, the Court was "unable to conclude that one whose burden . . . is to show continuing and total disability for nearly twenty years supplies the essential proof of continuity when he wholly omits to show his whereabouts, activities or condition for five years, although the record discloses evidence must have been available . . . " *Id.* at 396.

Next, petitioner appeals to this Court as jurors to consider what it calls the "most probative piece of evidence" in the case: Braddock's letter, written prior to the inauguration of the Newman regime at Buckingham and more than a year before the events at issue in the case, requesting an exclusive distributorship. Contrary to petitioner's repeated assertion, it was far from "undisputed" that interbrand competition was promoted by the termination of respondent. Petitioner neglects to mention that Copper State already distributed Dewar's, another of the "big four," on an exclusive basis. Tr. 521-22. The termination of respondent thus *eliminated* interbrand competition between two of the four premium scotches in Arizona, since Copper State distributed and was in a position to set the prices for both. Of course, this was consistent with petitioner's avowed goal of establishing the price of Cutty Sark as equally as possible to the prices of J & B, Johnnie Walker Red, and Dewar's—in other words of eliminating price competition with these brands.[10]

Even assuming the accuracy of petitioner's contention that interbrand competition ultimately was promoted by the termination, the termination nevertheless was not immunized if it was substantially the product of an unlawful agreement to eliminate price competition. The existence of legitimate reasons for the termination "makes it neither more nor less probable that . . . [petitioner] acted in concert with others rather than unilaterally." *H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 943 (2d Cir. 1981), *cert. denied*, 103 S.Ct. 176 (1982). The test is whether the elimination of price competition, pursuant to a meeting of the minds between petitioner and Copper State, substantially contributed to the decision to terminate respondent. *Uniroyal Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350, 355 (S.D.N.Y. 1978); *see Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 143-44 (1968) (White, J., concurring). Petitioner stretches the court of

[10] As the Court noted in *Continental T.V. v. Sylvania*, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." 433 U.S. at 52 n.18; original emphasis; *quoting White Motor Co. v. United States*, 372 U.S. 253, 268 (1963) (Brennan, J., concurring). This case certainly fits that description.

appeals' reasoning beyond recognition by ascribing to it a "belief" that the Braddock letter "was not to be considered . . . in determining whether a conspiracy existed" (Pet., p. 15); nothing in the decision so indicates. At any rate, this evidence was for the jury to consider.

Petitioner's attack on the court of appeals for its purported "conclusion"—nowhere stated in the decision—"that a conspiracy may be inferred notwithstanding undisputed evidence that a termination was in the supplier's competitive self-interest" (Pet., p. 15) is unwarranted.[11] Not only was the evidence disputed, but petitioner's premise misstates the law. In effect, petitioner contends that a showing of adverse self-interest is always necessary regardless of the amount or weight of the other evidence. Neither the cases cited by petitioner nor the Department of Justice have adopted this position. At most, those authorities suggest that mere *parallel action* does not give rise to an inference of collusion, where there is no other direct or circumstantial evidence of agreement and no showing that the acts are inconsistent with the firm's self-interest.[12] This case

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[11] Although the elimination of interbrand price competition may have been in petitioner's "competitive self-interest" (Pet., p. 15), "the policy of the antitrust laws is not qualified or conditioned by the convenience of those whose conduct is regulated." *United States v. Paramount Pictures*, 334 U.S. 131, 159 (1948).

[12] *See Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982) (refusal to grant preliminary injunction affirmed where "[t]here was no . . . direct evidence and the circumstantial evidence was . . . too tenuous . . ."); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 114-15 (3d Cir. 1980), *cert denied*, 451 U.S. 911 (1981) ("aside from the evidence of complaints made to Texaco by other retailers, Sweeney introduced no evidence of a conspiracy . . ."); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (where consciously parallel business behavior was all that was alleged, a showing of acts against self interest would be required). In an *amicus* brief filed with this Court in the *Plywood Antitrust Litigation*, the government indicated its position that evidence of acts against self interest is only necessary when parallel conduct is relied upon to supplement other direct or circumstantial evidence of agreement:

> "[T]he plaintiff should be allowed to introduce evidence of parallel conduct to *supplement* other evidence of agreement, direct or circum-

(footnotes continued on following page)

does not involve mere parallel action. Petitioner cites no case in which a showing that the conspiracy was against self-interest was required where the circumstantial evidence of conspiracy was otherwise sufficient to go to the jury, as it was here. There is no conflict between the decision below and that of any other circuit.

The contention that the court of appeals' decision "encourages anticompetitive behavior" is also without merit. This argument requires the factual assumptions that only routine "complaints and inquiries" were made, that petitioner's actions were entirely unilateral, and that the termination promoted interbrand competition; all of these assumptions are disputed.[13] The evidence showed conduct which was far from "inevitable." After *Buckingham*, a supplier is still free to *unilaterally* terminate its distributor, even a price cutter, for whatever reasons it chooses (and an attorney may so advise his or her client); it is still not free to do so pursuant to concerted action with a competing distributor to eliminate price competition. The "Catch 22" perceived by petitioner and the district court is illusory. Had petitioner not engaged in actions which permitted the reasonable inference of concerted action, it would have been free to terminate either wholesaler without fear of antitrust liability. The court of appeals' decision that the evidence permitted such an inference is fully consistent with existing law.

(footnotes continued from preceding page)

stantial, only if he is prepared to show that the parallel conduct was inconsistent with the defendants' independent competitive interest and, hence, unlikely to occur absent collusion." ("Brief for the United States as Amicus Curiae," p. 10, *Weyerhaeuser Co. v. Lyman Lamb Co.*, Nos. 81-1618, 81-1619 (U.S.); emphasis added.)

[13] Petitioner's assertion that complaints from rival distributors about price cutting are inevitable is contradicted by the record. Respondent *never* complained about Copper State's discounts on Cutty Sark (Tr. 208, 530); Braddock only referred to them when petitioner demanded an explanation for respondent's price cutting. The statement that "[i]n each case, the higher price wholesaler complained" (Pet., p. 12) is simply wrong.

II.

Petitioner's Attempt To Link This Case To *Monsanto v. Spray-Rite* Is Based Upon An Erroneous Characterization Of The Evidence And An Imaginary Conflict Between The Decision Below And Those Of Other Circuits.

Recognizing the weakness of its position as confined to this case alone in light of the record below, petitioner suggests that this Court will be "assisted" if this case is heard in tandem with *Spray-Rite Service Corporation v. Monsanto Company*, 684 F.2d 1226 (7th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3627 (U.S. Feb. 28, 1983) (No. 82-914). Pet., pp. 7-11. The Court should reject this invitation.

Although it claims that the issues in this case and in *Monsanto* are "so related" that "little additional burden would be placed on this Court's docket" by combined consideration (Pet., p. 11), petitioner elsewhere concedes that the facts and issues in the two cases are entirely different. In *Monsanto*, the Seventh Circuit held that "proof of termination following customer complaints is sufficient to support an inference of concerted action." 684 F.2d at 1238.[14] Petitioner implicitly concedes that this case does not involve complaints alone. Pet., pp. 7-8. Petitioner thus would have this Court resolve the so-called "broader issue" of the circumstances under which subsequent communications between the supplier and its distributors may support an inference of conspiracy. However, this "broader issue" is not presented by this case.

First, it is not at all apparent that the conflict petitioner posits on this issue actually exists. The conflict identified by Justice White in *Schwimmer v. Sony Corporation of America*,

[14] The question of whether a conspiracy may be inferred solely from evidence of such complaints followed by termination has been accepted by the Court for review in *Monsanto*. Although it describes the resolution of this issue as "of limited utility," and although the facts of this case go well beyond complaints, petitioner poses exactly the same issue as its Question 1 in the Petition. There is no basis for this Court to consider the identical issue in this case, especially given petitioner's view of its unimportance.

103 S.Ct. 362, 363 (1982) (White, J., dissenting from denial of certiorari), concerned the sufficiency of complaints alone—the issue accepted for review in *Monsanto*—not the sufficiency of subsequent communications. None of the cases cited by petitioner appear to disagree over the "broader issue."

Second, even assuming there is such a conflict, the court of appeals' holding that evidence of the type shown in this case suffices to go to the jury does not conflict with any of the decisions cited by petitioner.[15] Although petitioner persists in inaccurately labelling its actions as "routine inquiries," the evidence supports a much stronger characterization. Petitioner has not explained how the result in this case would have differed in any other circuit; clearly, it would not have.

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[15] None of the cases cited by petitioner involved evidence nearly as strong as the Ahlburg-Gellerman and Ahlburg-Braddock pricing conversations and the Ahlburg memorandum. The cases cited for the existence of a so-called conflict regarding "communication" evidence involved complaints only, or at most, complaints and internal discussions. *See, e.g., Bruce Drug, Inc. v. Hollister Inc.*, 688 F.2d 853, 856 (1st Cir. 1982) (preliminary injunction to continue supply vacated; no evidence beyond receipt of complaints); *Battle v. Lubrizol Corp.*, 673 F.2d 984, 992, *reh'g en banc granted* (8th Cir. 1982) (summary judgment for defendant reversed; no evidence beyond receipt of complaints and internal supplier discussions); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3421 (November 19, 1982) (No. 82-848) (summary judgment affirmed; no evidence beyond complaints); *Roesch, Inc. v. Star Cooler Corp.*, 671 F.2d 1168, 1172, *reh'g en banc granted* (8th Cir. 1982) (directed verdict affirmed; no evidence beyond complaints); *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 103 S.Ct. 362 (1982) (judgment for plaintiff reversed; no evidence beyond complaints); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 743 (7th Cir. 1982) (refusal to grant preliminary injunction for plaintiff affirmed; no evidence that supplier communicated with competing distributor about termination); *Venture Technology, Inc. v. National Fuel Gas Company*, 685 F.2d 41, 47 (2d Cir.), *cert. denied*, 103 S.Ct. 362 (1982) (judgment for plaintiff reversed; no evidence beyond complaints); *Blankenship v. Herzfeld*, 661 F.2d 840, 845 (10th Cir. 1981) (judgment for defendant affirmed; no evidence beyond complaints); *H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 942 (2d Cir. 1981), *cert. denied*, 103 S.Ct. 176 (1982) (judgment for plaintiff reversed; evidence of complaints alone, plus discrediting of other explanations for termination, not enough absent some basis to infer concerted action); *Bostick Oil Co. v. Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶65,271 (4th Cir. 1983) (directed verdict for defendant reversed; receipt of complaints followed by termination sufficient). *See also* note 12, *supra*.

Third, this case is particularly inappropriate to resolve such a conflict, if it exists. The court of appeals did not acknowledge such a conflict, did not cite or discuss a single one of the cases which petitioner lists, and disposed of the appeal in an unpublished memorandum. If there were a conflict between this case and other decisions, this Court would have to independently review the record and substitute its own view of the evidence for that of the court of appeals in order to ascertain it.

Finally, even if the "broader issue" of the sufficiency of "communications" evidence actually were presented by this case, petitioner's assumption that it could not be resolved in *Monsanto* is flawed. If the Court affirms the Seventh Circuit, the issue will be moot. If the Court reverses in *Monsanto*, presumably it will indicate in doing so the degree of evidence required to infer concerted action. Either way, consideration of this case would be redundant.[16]

III.

Petitioner's Attack On The Per Se Rule Was Not Raised In The Court Of Appeals, And In Any Event Is Unwarranted.

Petitioner's final point requires little response. Although petitioner asks this Court to grant certiorari to consider whether concerted action to maintain resale prices should continue to be classified as *per se* illegal, it failed to raise this argument to the court of appeals. This Court should not consider the issue in the first instance. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Petitioner gives no valid reason why a rule which is uniformly followed by the circuits should be abandoned.[17] In

[16] For the above reasons, petitioner's alternative suggestion to delay disposition of this case until the decision in *Monsanto* is inappropriate.

[17] *See, e.g., Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982); *Alloy International Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222 (7th Cir. 1980); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963); *Bostick Oil Co. v. Michelin Tire Corp.*, 1983-1 Trade Cas. (CCH) ¶65,271 (4th Cir. 1983).

any event, if this Court does reconsider the rule in connection with *Monsanto*, there is no reason to do so in this case as well. As discussed above, petitioner's assumption that the conduct at issue here was indisputably procompetitive is incorrect, both on the facts of this case and as a matter of policy. *See* notes 9 and 10, *supra*.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

DATED: May 16, 1983

Respectfully submitted,

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APPENDIX

Exhibit 101 (Tr. 113)

MEMORANDUM

PERSONAL & CONFIDENTIAL Date: April 29, 1981

To: Steve Karp From: Ken Ahlburg

Subject: ARIZONA

The state of Arizona is too small for two wholesalers selling our line. Forgetting all the standard cliches, shelf management is non-existent and uniform marketing that gets results cannot be coordinated with a dual.

This month, Arizona Distributors had a 5 case discount of $15.00 off on Cutty Sark (see attached), coupled with April being a buy-in, makes no sense. Plus, 5 case discounts do not get floors, 50 and 100 case discounts get the action. We sold a lot of goods in but the action to the consumer is not there.

I spoke with Jack Braddock regarding this, and his reason was that he felt that Copper State was always beating his deal by a dollar. By doing this, he would "show Copperstate".

In my opinion, "Showing Copper State" can and will be very detrimental to our over-all long term marketing of Cutty Sark.

I also spoke to Bernie Gellerman and he swears he has not been doing any such pricing.

I am recommending we have Copper State handle our complete line on an exclusive basis.

Regards,

KA:hb

ARIZONA DISTRIBUTING COMPANY

APRIL 20TH THRU APRIL 30TH

CUTTY SARK SCOTCH

(ALL SIZES ASSORT)

		1 CASE	3 CASES	5 CASES
1.75 LITER	(103.80)	10.00	12.00	15.00
LITER	(125.40)	10.00	12.00	15.00
750 ML	(94.80)	8.00	10.00	12.00
500 ML	(138.00)	10.00	12.00	15.00
200 ML	(122.40)	10.00	12.00	15.00

NET BOTTLES

	1 CASE	3 CASES	5 CASES
1.75 LITER	15.64	15.30	14.80
LITER	9.62	9.45	9.20
750 ML	7.24	7.07	6.40
500 ML	5.34	5.25	5.13
200 ML	2.35	2.30	2.24

(1.75 LITER AND LITER STILL ASSORT IN PREMIUM FAMILY BAR PLAN)

SPECIAL